Filed 12/4/12 Chaaban v. Wet Seal CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SALLY CHAABAN, Plaintiff and Appellant, v. WET SEAL, INC., et al., Defendants and Respondents.	G046122 (Super. Ct. No. 30-2008-00116172) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Frederick P. Horn, Judge. Affirmed.

Law Offices of Sima Fard and Sima Fard, for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Ryan D. McCortney and Matthew M. Sonne, for Defendants and Respondents.

INTRODUCTION

This is appellant Sally Chaaban's third trip to the Court of Appeal after losing a jury trial against her former employer. Her first appeal was dismissed as untimely. An order awarding the employer its costs on appeal accompanied the dismissal. Chaaban lost the second appeal, one from an order denying her posttrial motion to tax costs. She has returned yet again, this time to appeal from another order denying another motion to tax costs, the costs the employer was awarded on appeal no. 1, the appeal that was dismissed.

Once again, we affirm the trial court. Chaaban failed to carry her burden of showing that the allowable costs claimed in the cost memorandum were not paid. The trial court properly denied her motion to tax costs.

FACTS

Chabaan sued her employer, Wet Seal, Inc., alleging a single cause of action for wrongful termination in violation of public policy.[1] In June 2010, the jury rendered a defense verdict; the trial court entered judgment in Wet Seal's favor on September 22, 2010. On the same day, Wet Seal's counsel personally served a file-stamped copy of the judgment on Chaaban's counsel.

Chaaban's counsel then missed two important deadlines. She did not file a notice of intention to move for a new trial until October 20, 2010. (See Code Civ. Proc., § 659.) She also did not file a notice of appeal within 60 days of service of the file-stamped copy of the judgment. (See Cal. Rules of Court, rule 8.104(2).) The motion for new trial was denied as untimely. We ultimately dismissed her appeal on Wet Seal's motion as untimely. Wet Seal was awarded its costs on appeal. The dismissal became final on August 2, 2011.

---

[1] Chaaban actually sued two Wet Seal entities, Wet Seal, Inc., and Wet Seal Retail, Inc. The parties never made any effort to distinguish between the two defendants in the lower court, and we refer to them collectively as Wet Seal, as they did.

While the appeal from the trial court judgment was pending, Chaaban filed another notice of appeal, this time from an order denying her posttrial motion to tax the costs incurred in the trial court. We affirmed this order in an opinion partially certified for publication, filed on January 31, 2012. (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49 (*Chaaban*).)

The appeal from the trial court *judgment* having been dismissed as untimely, Wet Seal filed a cost memorandum in the trial court to recover its costs on appeal. Chaaban filed a motion to tax these costs, asserting that Code of Civil Procedure sections 1032 and 1033.5 did not allow Wet Seal to recover the costs of the reporter's transcript from the trial because it was not "ordered by the court." In addition, she argued Wet Seal had referred to only three days' worth of transcripts in its motion to dismiss the appeal, so Wet Seal did not need the entire reporter's transcript; the rest was "unnecessary." She also objected to a cost item of $25.50 for copying, because no "photocopy of a model, blow-up, or trial exhibit" was involved in the appeal. Finally, she objected to a charge of $62.50 as the cost of service of a motion, as "not allowed under the statute."

In its opposition, Wet Seal pointed out that Chaaban was relying on an inapplicable statute. Costs on appeal are governed by California Rules of Court, rule 8.278(d), not the Code of Civil Procedure. It also submitted copies of the invoices for the reporter's transcripts, which constituted the bulk of the costs, and evidence to support the copying and service costs.

In her reply, Chaaban accused Wet Seal of misrepresenting facts to the court by providing only copies of the invoices without copies of the checks that paid them. She also submitted a series of e-mails between her counsel and the trial court reporter. These e-mails, Chaaban maintained, showed that Wet Seal had not paid for the transcripts.

The trial court denied Chaaban's motion to tax costs in its entirety. The court held that copies of the invoices were satisfactory evidence of the amounts paid for the reporter's transcripts. In response to Chaaban's expressed concern about "double-dipping," the trial court included a proviso in its order that if Wet Seal prevailed in the *Chaaban* appeal, it could not recover the cost of the reporter's transcript as part of its costs on that appeal. Chaaban has appealed from the order denying her motion to tax costs on appeal.

DISCUSSION

California Rules of Court, rule 8.278, subdivision (d) permits the recovery of certain costs on appeal "if reasonable," among them "the amount the party paid for any portion of the record." The rule does not require that the amounts paid be "necessary," only that they be "reasonable."[2] (See *Alan S. v. Superior* Court (2009) 172 Cal.App.4th 238, 261.)

The superior court determines what costs are awarded on appeal, after the notice of issuance of the remittitur has been sent. (Cal. Rules of Court, rule 8.278(c)(1).) The party to whom costs have been awarded must file a memorandum of costs, and the opposing party may file a motion to tax costs. (*Id.*)

The issue Chaaban seems to have raised in her opening brief on appeal is lack of substantial evidence to support the order denying her motion to tax costs, in particular the costs incurred to obtain the reporter's transcripts.[3] She argues, in effect, that her counsel's e-mail exchange with the court reporter proves Wet Seal did not

---

2 Cf. Code of Civil Procedure section 1033.5, subdivisions (a)(3) ("necessary" depositions) and (a)(6) ("necessary" surety bonds).

3 Chaaban also objected in the trial court to the charge for service of the moving papers. (See Cal. Rules of Court, rule 8.278(d)(1)(D.) She did not renew this objection in her opening brief, and we therefore deem it abandoned. (See *Arechiga v. Dolores Press, Inc.* (2011) 192 Cal.App.4th 567, 578.) Her opening brief mentioned her objection to the $25 charge for copying Wet Seal's motion papers (see Cal. Rules of Court, rule 8.278(d)(1)(E)), but she provided no legal argument or authority regarding this issue. We deem this objection abandoned as well. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699.)

actually pay the reporter for any transcripts, notwithstanding the invoices and the declaration from Wet Seal's attorney that Wet Seal paid the court reporter.

A memorandum of costs on appeal is prima facie evidence of an allowed cost. (*Combs v. Haddock* (1962) 209 Cal.App.2d 627, 633.) The party opposing the cost has the burden of establishing the contrary; without such proof, the item is recoverable. (*Ibid.*) If substantial evidence supports the trial court's determination of costs, we affirm it. (*Care Constr., Inc. v. Century Convalescent Centers, Inc.* (1976) 54 Cal.App.3d 701, 703, disapproved on other grounds in *Canal-Randolph Anaheim, Inc. v. Wilkowski* (1978) 78 Cal.App.3d 477, 496.)

Chaaban appears to believe that the mere filing of a motion to tax costs is sufficient to shift the burden of proof to the party claiming costs. This is incorrect. A memorandum of costs, signed under penalty of perjury, establishes a prima facie case for those items properly allowable by statute. The burden is then on the party challenging the costs to make a showing that the disputed items are unreasonable, unnecessary, or not allowable, as appropriate. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131; *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1266.) Under California Rules of Court, rule 8.278(d)(1)(B), the amount paid for the transcripts was allowable. It was therefore Chaaban's burden to present evidence showing the amount was not paid.

Wet Seal submitted evidence in the form of copies of invoices from the court reporter adding up to the $3,694.43 entered on the cost memorandum for this expense. In addition, Wet Seal's counsel stated in his declaration that Wet Seal had paid this amount for transcripts.

Chaaban's contrary evidence was clearly inadequate. Counsel's declaration said she had contacted the court reporter, inquiring when Wet Seal ordered the transcripts and how much they cost. The court reporter responded that a transcript was ordered in July or August 2010 (corresponding to the priciest invoice dated August 10, 2010 – $3,112 for the transcript of the trial). Counsel then asked the reporter for further details

(what was ordered, when, and when paid for), but the reporter stated she did not have those records.

Relying on this slender reed, Chaaban argues that because the court reporter disclaims having a record of when the transcripts were ordered and paid for, Wet Seal did not pay the invoices. Nothing permits the prodigious leaps of logic implied by this argument. Chaaban failed to carry her burden to show Wet Seal did not pay for the reporter's transcripts. (See *County of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113-1114.)

The trial court sensibly conditioned the denial of Chaaban's motion on the proviso that Wet Seal could not recover the cost of the transcripts again if it prevailed in *Chaaban*, as it later did. California Rules of Court, rule 8.147(a)(1) provides that if more than one appeal is taken from the same judgment or from a related order, as happened in *Chaaban*, the parties need prepare only one record. Even though the appeal from the judgment was dismissed as untimely, the subsequent appeal in *Chaaban* from the motion to tax costs required use of the trial transcripts. The *Chaaban* appeal also resulted in an award of costs to Wet Seal. (*Chaaban*, *supra*, 203 Cal.App.4th at p. 60.) Chaaban pays for these transcripts one way or another.

DISPOSITION

The order denying Chaaban's motion to tax costs is affirmed. Respondents are to recover their costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.